

**Before the  
United States Copyright Royalty Judges  
Library of Congress**

In the Matter of:

Modification and Amendment of Regulations  
to Conform to the MMA

Docket No. 18-CRB-0012-RM

**COMMENTS OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”) is pleased to provide these comments in response to the Copyright Royalty Judges’ Notification of Inquiry (“NOI”) concerning necessary or appropriate modifications to the Judges’ regulations following enactment of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”). 83 Fed. Reg. 55,334 (Nov. 5, 2018).

As the Judges know well, SoundExchange is a nonprofit organization representing the interests of performing artists and sound recording copyright owners. It has been appointed repeatedly by the Copyright Royalty Judges to ensure the prompt, fair and efficient collection and distribution of royalties payable under the statutory licenses in Sections 112(e) and 114 of the Copyright Act. *See, e.g.*, 37 C.F.R. §§ 380.2(a), 380.4(d), 380.23(b), 380.33(b), 383.4(a), 384.4(b); Final Determination in Docket No. 16-CRB-0001 SR/PSSR (*SDARS III*) at 120-21 (new 37 C.F.R. § 382.5(d)).

As the NOI observes, “[t]he most sweeping changes” made by the MMA relate to the Section 115 “mechanical” compulsory license. 83 Fed. Reg. at 55,335. However, the MMA also made changes relevant to the treatment of sound recordings fixed before February 15, 1972 (“pre-1972 recordings”) under the Section 112 and 114 statutory licenses, and the NOI broadly solicits comments concerning changes that must or should be made to the Judges’ regulations to

reflect the MMA. SoundExchange provides these comments to suggest three groups of changes to the Judges' regulations under Sections 112 and 114 that are appropriate under the MMA:

- Clarifying for all purposes of Chapter III of Title 37 C.F.R. that a copyright owner of sound recordings includes a “rights owner” as defined in 17 U.S.C. § 1401(1)(2);
- Generalizing scattered references to “copyright” in Chapter III of Title 37 C.F.R. to include the protection provided by 17 U.S.C. § 1401; and
- Deleting the provisions of new Part 382 Subpart C concerning adjustment of statutory royalty payments for SDARS to reflect use of pre-1972 recordings.<sup>1</sup>

SoundExchange describes below why each of these sets of changes is appropriate given enactment of the MMA.

#### **I. Clarifying That a Copyright Owner of Sound Recordings Includes a Rights Owner**

Title II of the MMA, which has the short title Classics Protection and Access Act, added to Title 17 of the U.S. Code a new Section 1401 that federalizes protection of pre-1972 recordings in a manner that is not technically copyright protection, but that substantially parallels copyright protection.<sup>2</sup> The Judges should amend their regulations in Chapter III of Title 37

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<sup>1</sup> Throughout these comments, SoundExchange refers to the new provisions of Part 382 as determined in *SDARS III* using the section numbers set forth in the Judges' Final Determination in *SDARS III*, although those provisions have not yet been published in the *Federal Register*, so they are not yet included in the Code of Federal Regulations as maintained by the National Archives and Records Administration and the Government Publishing Office.

<sup>2</sup> See, e.g., 17 U.S.C. § 1401(b)(2) (referring to statutory licensing of pre-1972 recordings “in the same manner as . . . for sound recordings that are fixed on or after February 15, 1972”); Chairmen and Ranking Members of the House and Senate Judiciary Committees, Background and Section-by-Section Analysis of the Music Modernization Act at 24-25 (Oct. 19, 2018) (referring to a “new federal right” that “applies to pre-1972 recordings all the protections provided to copyrighted works”), available at <https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf>.

C.F.R. to reflect that a “copyright owner” includes a “rights owner” of pre-1972 recordings as defined in 17 U.S.C. § 1401(l)(2).

Under Section 1401, when a digital music service makes an ephemeral reproduction of a pre-1972 recording or publicly performs a pre-1972 recording, the provider engages in “covered activity” as defined in Section 1401(l)(1). Engaging in such covered activity “without the consent of the rights owner” is a violation of Section 1401(a) subjecting the provider “to the remedies provided in sections 502 through 505 . . . to the same extent as an infringer of copyright.” 17 U.S.C. § 1401(a). However, a user of pre-72 recordings may make the types of uses subject to statutory licensing under Sections 112 and 114 without violating Section 1401(a) if it:

pays the statutory royalty for the transmission or reproduction pursuant to the rates and terms adopted under sections 112(e) and 114(f), and complies with other obligations, in the same manner as required by regulations adopted by the Copyright Royalty Judges under sections 112(e) and 114(f) for sound recordings that are fixed on or after February 15, 1972.

17 U.S.C. § 1401(b).

As a result of these provisions, it is expected that statutory licensees will commence making statutory royalty payments for pre-1972 recordings (to the extent they were not already paying statutory royalties for their use of pre-1972 recordings), and that SoundExchange will handle those payments in the same manner that it handles statutory royalties paid with respect to post-1971 recordings. However, Chapter III of Title 37 C.F.R. has numerous references to copyright owners. In Part 370, that term is used without being specifically defined. *E.g.*, 37 C.F.R. §§ 370.1(a), 370.2(a), 370.5(d). In the relevant parts of Subchapter E, the term is defined in various places. 37 C.F.R. §§ 380.7, 380.21, 380.31, 382.1, 383.3(b), 384.2. SoundExchange

does not believe it is necessary to amend Chapter III of Title 37 C.F.R. to reflect that a rights owner under Section 1401(l)(2) is to be treated the same as a copyright owner, because that is in effect what Section 1401(b) provides. Moreover, many of the references to copyright owners in Chapter III of Title 37 C.F.R. are merely explanatory in nature, and many copyright owners are also rights owners under Section 1401(l)(2).

Nonetheless, it would be most accurate and clearer if the term copyright owner was defined to include a rights owner under Section 1401(l)(2) for all relevant purposes of Chapter III. Toward that end, SoundExchange proposes adding a new definition of “copyright owners” in Section 370.1 that reads as follows:

*Copyright owners* means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

The existing definitions of copyright owners in Sections 380.7, 380.21, 380.31, 382.1, 383.3(b), and 384.2, which are similar to the foregoing but vary in details peculiar to the parts in which they appear, similarly should include a reference to rights owners.

## **II. Generalizing Scattered References to Copyright**

For essentially the reasons described above, various other scattered references to “copyright” in Chapter III of Title 37 C.F.R. should be generalized to contemplate the protection provided by Section 1401. As in the case of references to “copyright owners,” SoundExchange does not believe that these references need to change to reflect the MMA, because Section 1401(b) specifies that pre-1972 recordings are subject to statutory licensing on the same terms as post-1971 recordings. However, it would be most accurate and clearer if the regulations reflected Section 1401(b). The specific references identified by SoundExchange are the

following, which SoundExchange proposes revising as indicated (~~strikethrough~~ indicates deletion and underline indicates new matter):

- 37 C.F.R. § 370.4 (Definition of Aggregate Tuning Hours): “less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under ~~United States copyright law~~ title 17, United States Code”
- 37 C.F.R. § 370.4 (Definition of Performance, paragraph (1)): “A performance of a sound recording that does not require a license (e.g., the sound recording is not ~~copyrighted~~ subject to protection under title 17, United States Code)”
- 37 C.F.R. § 380.7 (Definition of Performance, paragraph (1)): “A performance of a sound recording that does not require a license (*e.g.*, a sound recording that is not ~~copyrighted~~ subject to protection under title 17, United States Code)”
- 37 C.F.R. § 380.21 (Definition of ATH): “less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under ~~United States copyright law~~ title 17, United States Code”
- 37 C.F.R. § 380.21 (Definition of Performance, paragraph (1)): “A performance of a sound recording that does not require a license (*e.g.*, a sound recording that is not ~~copyrighted~~ subject to protection under title 17, United States Code)”
- 37 C.F.R. § 384.3(a):  
  
*Basic royalty rate.* For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay 12.5% of such Licensee’s “Gross Proceeds” derived from the use in such service of musical programs that are attributable to ~~copyrighted~~ recordings subject to protection under

title 17, United States Code. “Gross Proceeds” as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of ~~copyrighted~~ sound recordings subject to protection under title 17, United States Code during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to ~~copyrighted~~ recordings subject to protection under title 17, United States Code may be made on the basis of:

(1) For classical programs, the proportion that the playing time of ~~copyrighted~~ classical recordings subject to protection under title 17, United States Code bears to the total playing time of all classical recordings in the program, and

(2) For all other programs, the proportion that the number of ~~copyrighted~~ recordings subject to protection under title 17, United States Code bears to the total number of all recordings in the program.

### **III. Deleting SDARS Pre-1972 Deduction**

Relatedly, the provisions of new Part 382 Subpart C concerning adjustment of statutory royalty payments for SDARS to reflect use of sound recordings fixed before February 15, 1972 have become inoperative by their terms. To avoid any confusion in that regard, the Judges should delete those provisions.

Section 382.23(b) contains a formula for reducing an SDARS provider’s statutory royalty payment based on its use of “Pre-1972 Recordings.”<sup>3</sup> The term “Pre-1972 Recording” as used in that provision is defined in Section 382.20 as “a sound recording fixed before February 15, 1972, *that is not a restored work as defined in 17 U.S.C. 104A(h)(6) or otherwise subject to protection*

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<sup>3</sup> The capitalized term is used herein as it is used in new Part 382 Subpart C. As explained in the following discussion, that term is narrower than what are otherwise referred to in these comments as lower-case “pre-1972 recordings.”

*under title 17, United States Code.*” (Emphasis added.) With the enactment of the MMA, all sound recordings fixed before February 15, 1972 are now “subject to protection under title 17, United States Code.” *See* 17 U.S.C. § 1401(a). That means that there is no longer such a thing as a “Pre-1972 Recording” as defined in Section 382.20. Accordingly, applying the formula in Section 382.23(b)(2) will always yield a “Pre-1972 Recording Share” of zero. That is precisely the right result under the MMA, because a service making use of pre-1972 recordings under the statutory licenses is to:

Pay[] the statutory royalty for the transmission or reproduction pursuant to the rates and terms adopted under sections 112(e) and 114(f), and compl[y] with other obligations, in the same manner as required by regulations adopted by the Copyright Royalty Judges under sections 112(e) and 114(f) for sound recordings that are fixed on or after February 15, 1972.

17 U.S.C. § 1401(b). Thus, if the definition of Pre-1972 Recording in 382.20 had not anticipated the possibility of protection such as that now provided by Section 1401, it would have been necessary to eliminate the adjustment in Section 238.23(b).

As it is, the definition of Pre-1972 Recording in 382.20 *does* accommodate the protection now provided by Section 1401. Accordingly, it is not necessary to change Part 382 Subpart C to provide for payment of statutory royalties for use of pre-1972 recordings. However, enactment of the MMA makes that definition and the formula in Section 382.23(b) superfluous.

Additionally, Section 382.23(a)(3) establishes the priority between the pre-1972 deduction and a parallel adjustment for direct licenses, which remains operative. Because there can never be a

pre-1972 deduction, Section 382.23(a)(3) is also superfluous. To avoid any confusion, these provisions should all be deleted.<sup>4</sup>

### **CONCLUSION**

SoundExchange appreciates the opportunity to provide these comments and looks forward to participating further as this proceeding progresses.

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Respectfully submitted,

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<sup>4</sup> It happens that Sirius XM has acquired rights to many pre-1972 recordings under various settlement and other license agreements, and so during the term of those agreements will presumably not be relying on the statutory licenses for its use of those recordings. *See, e.g.,* Ashley Cullins, *Flo & Eddie Settle with Sirius XM on Eve of California Trial*, *Billboard* (Nov. 14, 2016), *available at* <https://www.billboard.com/articles/news/7573725/flo-eddie-settle-siriusxm-eve-california-trial>; Eriq Gardner, *Record Giants Win \$210 Million Settlement With Sirius XM Over Pre-1972 Music*, *Billboard* (June 26, 2015), *available at* <https://www.billboard.com/articles/business/6612704/record-giants-win-210-million-settlement-with-siriusxm-over-pre-1972-music>. The MMA specifically addresses those agreements. *See* 17 U.S.C. § 1401(d)(2)(B). For purposes of the Judges' regulations, those agreements would seem to constitute direct licenses, permitting a deduction for the relevant usage under Section 382.23(a), rather than Section 382.23(b).